

COMMONWEALTH OF VIRGINIA

Department of Environmental Quality

Water Permitting Division

Subject: Guidance Memo No. GM22-2016 – Accelerated Nonpoint Source Nutrient Credit Release for Stream Restoration Projects

To: Water Permitting Division Staff

From: Scott Morris, Director, Water Division 

Date: December 6, 2022

Summary:

The 2022 General Assembly passed SB 187 authorizing the Department of Environmental Quality (DEQ) to accelerate the release of nutrient credits from stream restoration projects notwithstanding release schedules set out in regulation. This guidance seeks to clarify the changes made to § 62.1-44.19:20 of the Code of Virginia and necessary conditions for requesting the accelerated release.

Electronic Copy:

- Once effective, an electronic copy of this guidance will be available on:
The Virginia Regulatory town Hall under the Department of Environmental Quality (<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>)

Contact Information:

Please contact Tyler Monteith, Office of VPDES Permits, (804) 489-1809, Tyler.Monteith@deq.virginia.gov, with any questions regarding the application of this guidance.

Certification:

As required by Subsection B of § 2.2-4002.1 of the APA, the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does no mandate or prohibit any particular action no otherwise required or prohibited by law or regulation. If alternative proposals are made, such proposals will be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Effective Date: February 2, 2023 **Initials:** _____

Nonpoint Source Nutrient Credit Accelerated Credit Release for Stream Restoration Projects

Overview

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Disclaimer:

Some definitions provided in this guidance are not defined in the Code of Virginia and have been included to provide clarification and do not change the meaning of any definitions in the Code of Virginia

1. Introduction

In 2005, the state legislature created the Chesapeake Bay Watershed Nutrient Credit Exchange Program to allow Virginia's point and nonpoint sources of nutrient pollution in the Chesapeake Bay watershed to meet required nutrient reductions through trading (VA Code § 62.1-44.19:14 et seq). Credits generated through this program are also transferable in accordance with the Virginia Stormwater Offset Program (VA Code § 62.1-44.15:35), the Municipal Separate Storm Sewer System (MS4) Program (VA Code § 62.1-44.19:21.1), and the Virginia Soil and Water Conservation Board's Guidance Document on Stormwater Nonpoint Nutrient Offsets approved on July 23, 2009. Regulations on the certification of nutrient credits (9VAC25-900) became effective on September 1, 2020.

Stream restoration is an eligible nutrient reduction practice for generating nonpoint source nutrient credits. One requirement of stream restoration projects is that the bank sponsor provide financial assurances prior to the release of any credits. Financial assurances provide resources that can be used by the bank sponsor or long-term steward to monitor and correct deficiencies in the restoration project, or for DEQ to hire a third party if the sponsor does not take the necessary actions to achieve the objectives of the nutrient bank themselves.

Financial assurance requirements for stream restoration projects in 9VAC25-900-230.C.1:2 include funding short- and long-term financial assurance mechanisms to provide for the success of the project. The short-term financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of DEQ staff, and covers the cost of ten years of monitoring by a third-party. This financial assurance mechanism must be funded prior to any credit release. The long-term financial assurance mechanism must be in an amount approved by DEQ and held in a trust account at an appropriate financial institution or by a third-party long-term steward approved by the department. Typically, the long-term financial assurance is funded by a percentage of sales or by lump sums deposits made in conjunction with the credit-release schedule.

On April 11, 2022, Senate Bill 187 (SB187) was signed by the Governor and directs DEQ to develop criteria to accelerate the release of up to 50 percent of the nutrient credits generated by a stream restoration project based on (i) a determination that the level of risk for restoration failure

is low, (ii) the provision of additional financial assurance in an amount adequate to cover the cost of project repair or replacement in the event of failure, and (iii) the experience of the applicant or the applicant's agents who will implement the stream restoration project. To be eligible for an accelerated release, applicants must provide additional documentation to demonstrate that they meet the conditions in the following sections. All determinations will be made by DEQ. This guidance does not supersede the existing application requirements described 9VAC25-900-120.

2. Requirements for Accelerated Credit Release for Stream Restoration Projects

To qualify for an accelerated credit release, a project must meet conditions described below. Upon demonstration that the conditions for an accelerated stream nutrient credit release have been met, the Department will release 75 percent of the project's calculated credits (the initial 25% release plus the accelerated 50% release) following completion of construction and Department verification of completion of the conditions of the nutrient credit certification. The remaining 25 percent shall be released in accordance with the table below.

i. Determination of Low Risk

Eligible projects will provide a high degree of confidence that required performance standards will be achieved and demonstrate a low risk of failure. DEQ's determination of risk will be made on a case-by-case basis and may involve a review of application materials submitted pursuant to 9VAC25-900, assessment of specialized construction techniques and structures, on-site conditions, stream order, and/or an assessment of upstream conditions. DEQ's consideration of risk may vary among different portions of the same overall project (e.g., different stream reaches within a larger project may have different levels of risks favoring or disfavoring credit acceleration). Particular attention will be paid to upstream characteristics capable of impacting the restoration project's ability to meet the agreed upon performance standards. DEQ's experience with the success of similarly situated stream restoration projects and the success of restoration projects completed by those involved with the project may also be considered.

ii. Provision of Additional Financial Assurance

Current regulations (9VAC25-900-230 C) require that financial assurances be in place for all stream restoration projects in the form of a short-term mechanism to cover the cost of third-party or bank sponsor monitoring and a long-term management fund. This guidance addresses additional requirements when the acceleration of stream nutrient credits is being requested and does not supersede existing requirements in 9VAC25-900-230.

To qualify for an accelerated release a project must either (a) fund the long-term trust with the entire agreed upon amount prior to the first credit release, or (b) fund a short-term account equal to the cost of replacing accelerated phosphorus credits (50 percent of total phosphorus credits generated) based on the market rate, as demonstrated to the Department's satisfaction by the applicant, for perpetual nutrient credits generated in the same river tributary, or (c) fund a short-term account equal to an amount based on the nature of the stream restoration project and likely costs for project repair or replacement. DEQ will review the proposed amount and either approve the amount, request additional supporting information for the amount or deny the amount. The short-term fund must be held until such time that the full credit release would have normally occurred without an accelerated release. Should a comparable market rate not be available under

option (b) above, alternative credit values may be proposed for consideration. The short-term fund for replacing the accelerated credits may be included in the same instrument as the monitoring fund required by 9VAC25-900-230.C.1 or in a separate account using the financial mechanisms allowed in 9VAC25-900-230:330.

iii. Credentials for Applicants Experience

An applicant requesting an accelerated release must demonstrate the experience of the entity implementing the stream restoration project in completing successful stream restoration projects in Virginia. Qualified projects are those approved and operating in accordance with applicable federal and state guidance, laws, or regulations for the establishment of (i) stream restoration banks, pursuant to a mitigation banking instrument (MBI) signed by the Department of Environmental Quality and the U.S. Army Corps of Engineers, or (ii) a stream restoration project for purposes of reducing nutrients or sediment entering state waters. Information provided by the applicant should demonstrate the scale and scope of previous projects, familiarity with natural stream design and construction practices, the applicant’s adherence to monitoring and reporting requirements, success at meeting performance standards, and adaptive management strategies when necessary. Documentation may include as-built drawings, approved MBIs or Nutrient Reduction Implementation Plans, prospectus documents, monitoring reports, resumes of the primary personnel, regulatory correspondence, permit approvals, credit releases and any other information as the DEQ deems necessary and appropriate to assess the success of previous projects. In reviewing previous projects, enough time should have passed for the performance standards to be adequately assessed and should include at least one bank full event. A particular minimum level of experience is not being established. However, DEQ would consider a demonstration that the implementing entity has successfully completed similar stream restoration projects involving a cumulative total of at least 20,000 linear feet in Virginia within the last ten years as documentation of an adequately experienced applicant.

3. Comparison of Credit Release Schedules

		Typical Release Schedule		Accelerated Release Schedule	
Time	Conditions	Eligible Release	Cumulative Release	Eligible Release	Cumulative Release
Post Construction	As-built drawings submitted to DEQ, financial assurance mechanisms in place.	25%	25%	75%	75%
Monitoring Year 1 (Must take place after one full growing season)	All performance standards are met, the area or channel is stable, and evidence is presented that a bankfull event occurred within the monitoring year.*	25%	50%	0%	75%

Monitoring Year 2	All performance standards are met, the area or channel is stable, and evidence is presented that a bankfull event occurred within the monitoring year.*	25%	75%	25%	100%
Monitoring Year 3	All performance standards are met, the area or channel is stable, and evidence is presented that a bankfull event occurred within the monitoring year.*	25%	100%	0%	100%

*If a bankfull event did not occur, but performance standards are met and the channel is stable the project is eligible for a 10% release. Releases in the Chesapeake Bay Watershed are subject to 5% retirement in compliance with 62.1-44.19:20. No additional credits will be released after the fourth monitoring year until a bankfull event has occurred. After the fourth monitoring year, if a bankfull event occurs, the channel is stable, and all performance standards are met, 25% of the credits may be released that monitoring year, not to exceed the remaining credits available.